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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 276

RAYMOND HOPKINS,

Petitioner,

vs.

JOHN W. GARDNER, Secretary of Health, Education and Welfare,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER

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November . , 1967

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The opinion of the District Court dated September 30, 1965, is unreported and appears in Appendix III at page 8.

A subsequent opinion of the District Court (the relevant one here) dated March 14, 1966, is unreported and appears in Appendix IV at page 26. The opinion of the Court of Appeals for the Seventh Circuit was reported at 374 F. 2d 276 and appears in Appendix VIII at page 29.

Jurisdiction

The judgment of the Court of Appeals for the Seventh Circuit was dated and entered March 15, 1966. A timely motion for rehearing was denied April 21, 1966 (see Appendix IX at page 37). A stay of the issuance of the

mandate of the Court of Appeals had been granted by that Court, conditioned upon the filing of a petition for certiorari by June 22, 1967, which was accomplished. This Court granted certiorari October 9, 1967. The jurisdiction of the Supreme Court of the United States is invoked under Title 28 U.S.C., Sec. 1254(1). The basis of the jurisdiction of the District Court was Title 42 U.S.C. 406(b)(1) and Title 42 U.S.C. Sec. 405(g).

Statutory Provisions Involved

Section 206(b)(1) of the Social Security Act, 42 U.S.C. 406(b)(1) is amended by Section 332 of the Social Security Amendment of 1965, 79 Stat. 403 which provides in pertinent part as follows:

> "(b)(1) Whenever a court renders a judgment favorable to a claimant under this sub-chapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Secretary may, notwithstanding the provisions of section 405(i) of this title, certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits. In case of any such judgment, no other fee may be payable or certified for payment of such representation except as provided in this paragraph."

Questions Presented

1. The maximum amount of attorney fees allowable to a claimant's attorney by the District Court under 42 U.S.C. 406(b)(1) as amended by Section 332 of the Social Security Amendment of 1965, 79 Stat. 403, i.e., whether the ceiling on such fees should be based on the benefits of the claimant alone or the benefits of the claimant and other dependent members of his family who receive benefits by virtue of the claimant's disability.

2. Whether indigent claimants will be able to secure the services of skilled advocates in the presentation and prosecution of disability claims under the Social Security Act in the Federal District Courts and the right and need of such disability claimant to the services of skilled counsel.

Statement

This case was commenced in the District Court on July 2, 1964 (see Complaint, Appendix II) as an appeal to reverse the decision of the Secretary of Health, Education and Welfare that Raymond Hopkins was not totally and permanently disabled within the meaning of provisions of the Social Security Act. The District Court reversed the Secretary on September 30, 1965 (see Appendix III). Thereafter, on March 14, 1966, the District Court awarded claimant's attorney a fee equal to the amount of 25% of the benefits accruing to the claimant alone on the date of the awarded judgment (see Appendix VI). An appeal from this order was taken to the United States Court of Appeals for the Seventh Circuit which affirmed the District Court in an opinion at 374 F. 2d 276 (see Appendix VIII).

The Seventh Circuit limited the term "claimant" in the relevant sections of the Social Security Act above cited to the applicant alone, excluding any benefits due to dependent members of the claimant's family. Two opinions of the United States Court of Appeals for the Fourth Circuit are squarely opposed to this interpretation by the Seventh Circuit. The opinions of the Fourth Circuit were decided on May 12, 1966, in the cases of *Redden* v. *Celebrezze*, 361 F. 2d 815 and *Lambert* v. *Celebrezze*, 361 F. 2d 679, rehearing denied in both cases at 370 F. 2d 373, on December 8, 1966. The position of the Fourth Circuit has been followed in that Circuit by the United States District Court for the Western District of Pennsylvania in the case of *Blankenship* v. *Gardner*, 253 F. Supp. 405, decided July 8, 1966. The position of the Fourth Circuit has also been followed again by that Court in a more recent decision in *McKittric* v. *Gardner*, 378 F. 2d 872. The Fifth Circuit at this time has also taken the same position in an order entered July 20, 1967, in the case of *Alsobrooks* v. *Gardner*, which was reported at 357 F. 2d 110 (the relevant order itself is apparently unreported at this time).

In addition to the opinion in the instant case by the Seventh Circuit, the Sixth Circuit Court of Appeals in the case of *Sims* v. *Gardner*, 378 F. 2d 70, is contrary to the opinions of the Fourth Circuit and consistent with the opinion of the Seventh Circuit in this case. Also, on this subject is *Miracle* v. *Celebrezze*, Sixth Circuit 1966, 351 F. 2d 361, in which the question presented here is touched on only superficially. It is to be noted that a petition for writ of certiorari has been sought in the case of *Sims* v. *Gardner*, Misc. No. 386, now pending in this Court. The case of *Sims* v. *Gardner* and the instant case both present the same questions for review.

Argument

It was the clear intention of the District Court in its opinion in this case, dated March 14, 1966, to award to the Plaintiff's attorney the maximum fee which is permissible under the Social Security Act. The United States District Judge in this case determined such maximum was 25% of the past-due benefits to the claimant alone exclusive of any benefits due his dependent wife and dependent children. Neither the language of the pertinent section of the Social Security Act nor the legislative history warrant the restrictive interpretation put on the statute in this case and in the companion case of *Sims* v. *Gardner*. It is true in this case as in many similar cases that the dependents of the claimant, namely, his wife and two dependent children, received substantial benefits as a direct result of the efforts of the claimant's counsel and no good reason exists in the language of the statute or the legislative history to hold the Social Security disability benefits to the claimant's dependents immune from the allowance of attorney fees. It also is true that there are references in the legislative history of Section 406(b)(1) which was added to the Social Security Act in 1965 for the purpose of preventing attorneys from receiving "inordinately large fees". See U.S. Code, Congressional and Administrative News, 89th Congress, 1st Session, 1965, page 2062. The legislative history is absolutely devoid of any indication that Congress felt that a maximum fee of 25% of the benefits to the claimant and his dependents was "inordinately" high. The Court's attention is also directed to certain administrative regulations promulgated by the Department of Health, Education and Welfare as found in U.S. Code, Congressional and Admin-

istrative News, number 5, dated June 20, 1967, which the Petitioner believes to be in excess of the authority granted to the Department under the statute here in question.

This Court has granted the American Trial Lawyers Association, through its attorney, Israel Steingold, leave to file a brief amicus curiae in the companion case of *Sims* v. *Gardner*, No. 386, Misc. On October 9, 1967, this Court granted leave for the American Trial Lawyers Association to file a brief amicus curiae in the *Sims* v. *Gardner* case. The Petitioner respectfully represents that it was the express intention of the American Trial Lawyers Association to file this brief and have it considered in this case also and therefore the Petitioner respectfully requests the Court to consider the memorandum of the American Trial Lawyers Association filed in *Sims* v. *Gardner* in this case.

In this case and in the companion case of *Sims* v. *Gardner*, Misc. No. 386, there arises a great question of importance to all claimants for a period of disability under the Social Security Act as amended. The Bar, the District Courts, and the Courts of Appeal for all the Circuits require the resolution of this novel question for the sake of uniformity. The decision in this case will advise all of the interested persons, court and agencies of the maximum attorney fees which may be awarded by United States District Courts to a claimant's attorney in action for disability benefits under the Social Security Act.

That the mass of indigent and disabled claimants are equally as much in need of legal representation as indigent defendants in criminal cases is without question. The one seeks to preserve his freedom and reputation, and the other seeks to obtain the means of obtaining and sustaining freedom from hunger and despair.

The question in both this case and in *Sims* involves the interpretation of Title 42 U.S.C., Sec. 406(b)(1) and imposes the particular question of the base of which the fee determined by the District Court is to be computed, i.e., on only that portion of the past-due benefits paid directly for and to the head of families disabled, individual claimant, or some of the benefits paid not only to the head of family disabled, individual claimants but to his dependents resulting from the successful prosecution of the suit in a United States District Court.

The significant fact here involved under the Social Security Act, as amended, the judicial determination of the question whether benefits shall be paid to the dependents of the claimant, is inextricably involved with and wholly dependent upon the determination of the legal and factual questions of the disability of the head-of-family claimant. The dependents would receive nothing unless the head-of-family is held to be disabled and therefore eligible for benefits under the Social Security Act. It is the patent intent of the Congress to provide not only for the individual disabled head-of-family but for his dependents as well. The Fourth Circuit has held that counsel fees should be based upon "the amount of past-due benefits paid both to the disabled worker and his dependents as a consequence of the Court's judgment on the merits of the worker's claim, . . . since both the individual and his dependents gain from the lawyer's successful prosecution of the claim." See *Lambert* v. *Celebrezze*, 361 F. 2d 366 and *Redden* v. *Celebrezze*, 361 F. 2d 815, rehearing denied 370 F. 2d 373. It is most significant that the Secretary did not petition for certiorari in either case. The interpretation of Title 42 U.S.C., Sec. 406(b)(1) which the Secretary of Health, Education and

Welfare seeks in this case will result in further oppressive and economic restriction and will virtually prohibit claimants for disability benefits under the Social Security Act, as amended, from obtaining competent counsel. Certainly the tactics at the administrative level of the hearing examiners in these disability cases were criticized by the United States District Judge in his opinion in this case (see Appendix 1). There have been also numerous other cases in which these tactics have been criticized. This was commented on by the United States District Court in *Robinson* v. *Celebrezze*, 248 F. Supp. 149 (Western District South Carolina), dated September 10, 1965, as follows:

> "The statute provides a ridiculous maximum fee for compensation of counsel at the hearing level, where the determination may well shape the course of the remaining years of a tired life well spent, dedicatedly given, at the looms of industry. If the hearing examiner acts as judge, jury, prosecutor of the claimant, and advocate for the secretary; as has been the obvious and disgusting practice in the Piedmont textile region of South Carolina, the unrepresented claimant is beat before he starts . . ."

In this case a semi-illiterate claimant was confronted with governmental machinery which he neither understood nor could hope to master. Without counsel neither he nor his dependents would have received one cent in benefits under the Social Security Act.

The practical aspects of this situation are inescapable; no able and busy attorney, conscious of his need to remain financially solvent, can afford to take contingent representation of this nature if the Secretary's interpretation of

the fee statute is allowed to prevail. Additionally, by far the best method yet known to guarantee to the Social Security disability claimant the availability of skilled counsel is to provide an adequate means of compensation to skilled counsel. The Congress and many of the States have seen the need for providing the attorneys who represent indigent defendants in criminal cases the right to adequate and proper compensation. See Title 18 U.S.C., Sec. 3006A, Criminal Justice Act. The same policy question is involved in this case.

The need for adequate compensation for attorneys for claimants for Social Security system was early recognized by the First Circuit in *Gonzalez* v. *Hobby,* 213 F. 2d 68 (CA 1, 1954) at page 69 when the Court stated:

> "Certainly counsel who prosecutes such actions to review adverse decisions under the Social Security Act are entitled to receive reasonable fees for their services and the claimant for whom the services are performed should pay them. There is absolutely nothing in the pertinent section of the Social Security Act or its legislative history to indicate that Congress intended to change the policy of allowing reasonable fees for the services of attorneys who represent Social Security disability claimants."

In this instant case the United States District Court allowed to the claimant's attorney for his total fee for the representation of the Plaintiff the sum of $936.10, which represented 25% of the past-due benefits between January 1, 1963 and September 30, 1965. Additionally, the benefits during the same period for the claimant's dependent wife

were $1287.80 and for his dependent children $3463.50. The allowance of attorney fees on the basis fixed in this case constitutes approximately 11% of the total past-due benefits which accrued between January 1, 1963 and September 30, 1965. It is contended that this fee is unreasonably or "inordinately" low in view of the time and effort involved and in view of the results achieved and in view of the well-known economic facts of life affecting the legal profession. By action of the House of Delegates of the Indiana State Bar Association at its meetings October 26, 1965, and March 31, 1966, in acting upon a report of its Committee on Legal Economics recommended certain schedules relating to minimum fees as a guide to local bar associations in the State of Indiana in drafting and preparing their own fee schedules. These recommended schedules certainly represent a consensus as to what is reasonable attorney fees prevailing in the State of Indiana. The provisions of said schedule with reference to proceedings in the United States District Courts in civil cases are as follows:

1. For representing a claimant or plaintiff in a claim or action where representation on a contingent fee basis is proper

   A. 33 1/3% of amount of recovery upon settlement without trial.

   B. 40% of amount of recovery after trial.

   C. 50% of amount of recovery after appeal.

   Under the above percentages the client shall pay the expenses of litigation.

2. There are cases wherein damages are small or the legal or factual question difficult where the attorney

would be justified in charging 50% of the amount of recovery. In such cases, the expenses should be paid before any such division is made.

United States District Courts—Civil

A. General preparation for trial, including initial conferences, investigations, research, interviewing witnesses, and preparation, drafting and filing of complaint: minimum
$250.00 plus hourly charge for time spent in excess of 8 hours.

B. Same service as in "A": except for answer, third party complaint and third party answer: minimum
$200.00 plus hourly charge for time spent in excess of 7 hours.

C. Pre-trial conference: minimum $100.00

D. Attendance at docket or calendar call: minimum ..... $ 25.00

E. Trial, per diem: minimum $250.00

F. Preparation of findings, conclusions and order for judgment or decree and presentation or filing of same: minimum $100.00

G. Preparation of order for entry or default judgment: minimum ..... $ 50.00

H. Appearance to prove-up default judgment: minimum ..... $ 50.00

I. Preparation of pleadings for extraordinary remedies (in addition to above): minimum ..... $ 75.00

J. Third party practice, motions discovery and appearances should be charged at minimum rate of State Circuit Court rates plus 15% (see State Courts)

K. Hourly rate for items not otherwise covered above: minimum ..... $ 30.00 Per Hour

While the above fee schedule represents an average this Court should take judicial notice of all the proceedings in this case as shown by the relevant docket entries in the District Court. **See Appendix I, at page 1.**

The decision in this case will materially affect the availability of competent counsel in Social Security disability cases. This availability is far more important to the Social Security claimant than to the Bar.

CONCLUSION

For the above reasons the judgment and order of the United States District Court dated March 14, 1966, in this case should be reversed.

Respectfully submitted,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINIONS BELOW

The opinion of the court of appeals (A. 29–36) is reported at 374 F. 2d 726. The opinion of the district court (A. 26–28) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 15, 1967 (A. 37), and a petition for rehearing *en banc* was denied on April 21, 1967. The petition for a writ of certiorari was filed on June 21, 1967, and granted on October 9, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the maximum fee that Section 206(b)(1) of the Social Security Act, 42 U.S.C. (Supp. I) 406(b)(1), allows a court to award an attorney who has "represented before the court" "a claimant under this subchapter" is limited to 25 percent of the total of the past-due benefits owing to the claimant himself, or may also include 25 percent of such past-due benefits as the claimant's wife and children, who are not parties to the litigation, may obtain by reason of their relationship to the claimant.

STATUTE INVOLVED

Section 206(b)(1) of the Social Security Act, 79 Stat. 403, 42 U.S.C. (Supp. I) 406(b)(1), provides:

> § 406. *Representation of claimants.*
>
> * * * * *
>
> (b)(1) Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Secretary may, notwithstanding the provisions of section 405(i) of this title, certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits. In case of any such judgment, no other fee may be payable or certified for payment for such representation except as provided in this paragraph.

STATEMENT

Petitioner received disability payments under Section 223 of the Social Security Act, 42 U.S.C. 423, beginning as of March 1961. The benefits were terminated as of December 1962. A hearing examiner affirmed the termination, and the Appeals Council of the Department of Health, Education and Welfare denied petitioner's request for review (A. 9). Although the present record is silent on the subject, petitioner's wife and two minor children apparently had received, between March 1961 and December 1962, benefits under Section 202 of the Social Security Act as dependents of a recipient of disability payments (see A. 24).

On July 2, 1964, petitioner instituted a timely action in the United States District Court for the Northern District of Indiana, pursuant to Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), seeking review of the determination that he was no longer entitled to benefits (A. 5–7, 8, 30). On September 30, 1965, the district court entered an order (A. 16) reversing that determination and directing respondent "to allow and pay disability benefits to the plaintiff from the time of their termination until such time as a new determination is made that plaintiff's disability has, in fact, terminated."

On January 10, 1966, petitioner filed in the district court a Petition To Determine Accrued Benefits And Petition For Approval Of Agreement For At-